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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-361

EDWIN S. MALMED, STANLEY L. KUBACKI, GREGORY G. LAGAKOS, JOSEPH T. MURPHY, and JAMES L. STERN,

Petitioners,

vs.

RICHARD L. THORNBURGH, Individually and as Governor of Pennsylvania, ETHEL D. ALLEN, Individually and as Secretary of the Commonwealth of Pennsylvania, ROBERT E. CASEY, Individually and as Treasurer of the Commonwealth of Pennsylvania, and ALEXANDER F. BARBIERI, Individually and as Pennsylvania Court Administrator,

Respondents.

PETITIONERS' REPLY MEMORANDUM

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Respondents.

PETITIONERS' REPLY MEMORANDUM

Pursuant to *Rule* 22.4 of the Rules of the Supreme Court of the United States, Petitioners respectfully submit this memorandum in reply to Respondents' Brief in Opposition to Petition for a *Writ of Certiorari.*

RESTATEMENT OF THE CASE

Petitioners herein adopt the Statement of the Case set forth at pages 4 through 8 of their Petition for *Writ of Certiorari* filed on September 5, 1980, the pertinent facts of which Respondents have not disputed in their Brief in Opposition.

REPLY TO OPPOSING ARGUMENTS

A. *There exists no agreement between circuits regarding the questions here presented which questions have never been considered or decided by any other court*

Petitioners in this case do not attack mandatory retirement *per se* since no system of mandatory retirement of Pennsylvania judges, in effect, exists. Petitioners attack the system in Pennsylvania which, as evidenced by the stipulated and uncontradicted facts in the record, has since its implementation eliminated no judges but on the contrary has utilized the vast experience of judges reaching 70, while paying those judges substantially less than is paid to judges under 70 for the same work. See Petition, pages 12-14. This was made exceedingly clear to both the Court of Appeals and the trial court.

Because Respondents find it difficult to justify the system of "mandatory retirement" coupled with post retirement service as it exists in Pennsylvania, they create a "strawman" by suggesting that Petitioners' challenge, and the District Court's holding, are limited to the concept of mandatory retirement *per se*. Respondents then cite *Trafalet v. Thompson*, 594 F.2d 623 (7th Cir. 1979), *cert. denied*, — U.S. —, 100 S. Ct. 219, 62 L.Ed.2d 142 (1979) for the proposition that the only other Court of Appeals to have faced the issue, did, consistent with the Third Circuit decision in this case, rule that mandatory retirement *per se* does not violate the Fourteenth Amendment. Respondents conclude that such an agreement between the Circuits precludes any need for review by this Court.

Respondents have obviously missed the point. Neither *Trafalet*, distinguishable in that the state statute there

involved made specific provision for any judge performing post retirement service to receive the same compensation applicable to "non-retired" judges,[1] nor any other case has addressed or decided the actual issue here presented to this Court. Nor, for that matter, did the Court of Appeals below squarely confront the issue raised by Petitioners, which is, in itself, an appropriate reason to invoke this court's review. See Petition, pp. 12-14. Moreover, even if the issue presented in this case *were* to be limited to that decided in *Trafalet*, the mere fact of consistent decisions by two circuits would not alone obviate the need for review by this Court.

B. ***Petitioners have properly challenged not only Article V, Section 16(b), but all related constitutional provisions, legislation and regulations establishing and implementing the system of service by "Senior Judges" in Pennsylvania and have properly raised the unequal pay issue before the trial court***

Respondents argument, largely technical, that Petitioners did not challenge the constitutionality of the "unequal pay" and other relevant provisions is nevertheless inaccurate and incorrect.

Petitioners instituted this action by the filing of a Complaint for Declaratory Judgment, Injunctive and Other Equitable Relief citing *inter alia*, certain provisions concerning mandatory retirement, as well as the assignment and compensation of former judges, and requesting, *inter alia*, a declaration of the invalidity of mandatory retirement, and "such other relief as may be just and equitable." At trial, through their counsel's opening statement, and

1. See Petition for *Writ of Certiorari*, footnotes 6 at pages 14-15.

through the presentation of both live testimony and stipulated uncontradicted facts, Petitioners pursued a clear challenge to the Pennsylvania system of mandatory retirement, within the context of the present facts (See A, *supra*), taking issue with not only Article V, Section 16(b), but additionally, and in conjunction therewith, with any and all constitutional, statutory and regulatory provisions establishing and implementing the discriminatory system (37a-45a, 49a-50a; See A, *supra*). It is clear that the District Court, cognizant of the scope of Petitioners' challenge, and privy to the evidence presented in support thereof, premised its decision upon the unconstitutionality of not Article V, Section 16(b) alone, but upon the combined effect of what it perceived as a unified scheme 49a-50a; 62a-64a). The Court of Appeals then committed a basic error in its disregard of the record relating to the scheme. See Petition, pp. 12-14. Moreover, Respondents who have not questioned the scope of Petitioners' challenge all along should not be permitted to do so now.

C. Weinberger v. Salfi, *422 U.S. 749, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975) is not applicable to the facts of this case*

Weinberger v. Salfi, 422 U.S. 749, 95 S. Ct. 2457, 95 L.Ed.2d 522 (1974) does not, as Respondents contend, signal the demise of the irrebuttable presumption doctrine adopted by this court in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 31 L.Ed.2d 52 (1974), nor does it, as the Court of Appeals seems to have held, effectively reduce the doctrine to an equal protection rational relationship type of analysis. As noted in the Petition for *Writ of Certiorari*, at footnote 8, p. 18, *Salfi* merely deemed the *LaFleur* holding inapplicable to a narrow category of government benefits cases where the

plaintiffs enjoyed neither contractual nor constitutionally protected status (422 U.S. at 721-22, 95 S. Ct. at 2470) and where there was insufficient evidence that alternative means existed which could just as effectively satisfy the legislative purpose (422 U.S. at 782-83, 95 S. Ct. at 2475).

Following *LaFleur* in post-*Salfi* decisions such as *Turner v. Department of Employment Security*, 423 U.S. 44, 96 S. Ct. 249, 44 L.Ed.2d 181 (1975), and citing it with approval in others, *e.g.*, *Monell v. Department of Social Service of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), this Court has made it clear that lower courts should continue to apply the irrebuttable presumption doctrine to cases, like here, where the factual circumstances presented are virtually identical to those in *LaFleur*. Petitioners thus reiterate their argument, set forth at pages 15-20 of the Petition, that the Court of Appeals has, with respect to their Due Process challenge, erred.

D. *The District Court did properly analyze the legislative history of Article V, Section 16(b) and did render a proper decision accordingly*

Contrary to Respondent's assertion in this regard, the District Court did not ignore the legislative history of the constitutional provision in determining the Pennsylvania system of mandatory retirement to be "a thinly veiled system for acquiring cheap judicial labor" (63a). To the extent that any of those "state purposes" gleaned by the Court of Appeals from the Reference Manual were arguably relevant, the District Court did properly confront and adequately dispose of such purposes (52a-53a; Petition, pages 20-22). The Court of Appeals then erred in

sidestepping the record to substitute its own analysis as to the purpose of Article V, Section 16(b) even though the District Court's correct determination in that respect was amply supported by the records of the constitutional convention, and was based in part upon that position which Respondents themselves presented and then continuously adhered to throughout this litigation, that the primary purpose of mandatory retirement was to remove unfit judges. See Petition, pages 20-22.

CONCLUSION

For the reasons set forth in the Petition for *Writ of Certiorari*, and for the reasons set forth herein, it is respectfully submitted that a *Writ of Certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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